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7 T.P.,
8 Plaintiff,
9 v.
10 ANDREW M. SAUL,
11 Defendant.

Case No. [19-cv-03976-EMC](#)

**ORDER GRANTING PLAINTIFF'S
MOTION FOR ATTORNEY'S FEES**

Docket No. 26

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14 **I. INTRODUCTION**

15 Plaintiff T.P. filed suit against Defendant Andrew Saul in his official capacity as the
16 Commissioner of the Social Security Administration following denial of his application for social
17 security disability insurance benefits. This Court remanded. The Social Security Administration
18 reversed and granted benefits. Plaintiff filed the instant motion for an award of attorney's fees
19 pursuant to 42 U.S.C. § 406(b). *See* Docket No. 26 ("Mot"). Defendant filed a response taking no
20 position as to the reasonableness of the fee request. *See* Docket No. 27 ("Resp.") at 5.

21 For the following reasons, the Court **GRANTS** Plaintiff's motion.

22 **II. BACKGROUND**

23 The Commissioner initially denied Plaintiff's request for benefits in 2016 and again on
24 reconsideration in January 2017. *See*, Docket No. 23 ("Summ. J. Order") at 4-5. A year later,
25 Plaintiff appealed the Commissioner's decision to an Administrative Law Judge (ALJ) who also
26 denied his benefits petition. *Id.* at 4. The Appeals Council for the Social Security Administration
27 upheld the ALJ's decision in May 2019. *Id.*

28 Plaintiff appealed the Council's decision by filing the instant action in July 2019. *Id.* at 5.

1 To pursue his rights in this Court, Plaintiff retained Mr. Harvey Sackett as his counsel, agreeing to
2 pay him “a fee no greater than 25% of the past-due benefits owed” if he was able to secure a
3 positive result following judicial proceedings. *See* Mot., Ex. C. On July 14, 2020, this Court
4 reversed the agency’s benefits denial and remanded the case for further proceedings. This Court
5 then granted Plaintiff \$4,175.91 in fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. §
6 2412(d). *See* Docket No. 23 (Order Granting Award Stipulation) at 2.

7 On remand, ALJ Ruxana Meyer found in favor of Plaintiff, concluding that he was both
8 disabled and entitled to a period of disability insurance benefits. *See* Mot., Ex. A. As a result,
9 Plaintiff was awarded a gross total of \$86,987.50¹ in past-due benefits, of which 25% (or
10 \$21,747.00²) was withheld by the Social Security Administration for the purpose of paying Mr.
11 Sackett’s attorney’s fees. *See*, Mot., at Ex. B. Mr. Sackett then filed the present motion,
12 requesting \$17,571.09 be paid to him in attorney’s fees, representing the \$21,747.00 withheld
13 pursuant to 42 U.S.C. § 406(b), minus the \$4,175.91 previously awarded pursuant to the EAJA.
14 *Id.* Mr. Sackett states that he spent 19.9 hours in legal services and itemized this figure in the
15 present motion, resulting in a *de facto* hourly rate of \$1,091.81.³ *Id.* at 11.

16 Defendant filed a response to Plaintiff’s motion, noting the proper analysis for determining
17 the reasonableness of a fee award but without taking a position in this case. *See* Resp. at 5.

18 III. DISCUSSION

19 A. Legal Standard

20 Under § 406(b), a court that “renders a judgment favorable to a claimant . . . may

22 ¹ This amount was calculated retroactively by adding the withheld amount with the received
23 amount.

24 ² The Reply notes that this number is “inconsistent with Counsel’s calculation,” however, it would
25 appear that this inconsistency results from the Social Security Administration rounding up when
26 calculating the amount to be withheld for paying attorney’s fees. *See* Resp. at 2. Thus, the correct
calculation of 25% of past-due benefits would result in \$21,746.875, a mere \$0.125 less than the
amount currently at issue.

27 ³ This *de facto* hourly fee is calculated by dividing the amount withheld by the number of hours
28 spent where the numerator does not account for the EAJA award to be returned to the Plaintiff.
See, Young v. Berryhill, No. 18-cv-01721-DMR, 2021 U.S. Dist. LEXIS 111302, *4-5 n.1 (N.D.
Cal. Jun. 14, 2021)

1 determine and allow as part of its judgment a reasonable fee for such representation, not in excess
2 of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of
3 such judgment.” If an attorney is awarded fees under both the EAJA and § 406(b), “the claimant’s
4 attorney must ‘refund to the claimant the amount of the smaller fee.’” *Gisbrecht v. Barnhart*, 535
5 U.S. 789, 796 (2002) (quoting Act of Aug. 5, 1985, Pub. L. 99-80, § 3, 99 Stat. 186). In other
6 words, “an award of fees under section 406(b) must be offset by any award of fees under EAJA.”
7 *Young*, 2021 U.S. Dist. LEXIS 111302, *3–4. Mr. Sackett is therefore expected to issue a
8 \$4,715.91 refund to Plaintiff and only keep whatever portion of the \$17,571.09 the Court decides
9 to award him under § 406(b). However, in determining the reasonableness of a fee award under §
10 406(b), a court must view “the requested fee award under section 406(b) without first deducting
11 the EAJA fee award that will be refunded to Plaintiff.” *Young*, 2021 U.S. Dist. LEXIS at *4-5 n.1.

12 The Supreme Court in *Gisbrecht* laid out the test for determining whether fees are
13 reasonable under § 406(b). 535 U.S. at 808. The Court acknowledged that the circuits were split
14 as to the reasonableness determination under § 406(b). *Id.* at 799. Some courts “decline[d] to
15 give effect to [an] attorney-client fee agreement,” instead employing a “lodestar” method to
16 determine reasonable fees. *Id.* at 797. Under the lodestar method, courts would first determine
17 what a reasonable hourly rate should be (without looking to the attorney-client agreement) and
18 then adjust the contingency-fee to reflect this amount. *Id.* at 800–01. Other courts presumed “the
19 contingent-fee agreement between claimant and counsel, if not in excess of 25 percent of past-due
20 benefits” to be reasonable. *Id.* at 792. The *Gisbrecht* Court rejected the lodestar method and
21 determined that courts must “look[] first to the contingent-fee agreement, then test[] it for
22 reasonableness.” *Id.* at 808. Put differently, courts must determine if a fee resulting from an
23 agreement is unreasonable and “thus subject to reduction by the court.” *Crawford v. Astrue*, 586
24 F.3d 1142, 1148 (9th Cir. 2009).

25 In *Crawford*, the Ninth Circuit clearly laid out the factors courts should consider in
26 determining whether a contingency-fee agreement is “reasonable” under *Gisbrecht*. *Id.* In doing
27 so, the *Crawford* court held that a fee resulting from a contingent-fee agreement is unreasonable
28 “if [1] the attorney provided substandard representation or [2] engaged in dilatory conduct in order

1 to increase the accrued amount of past-due benefits, or [3] if the benefits are large in comparison
2 to the amount of time spent on the case.” *Id.* (citing *Gisbrecht*, 535 U.S. at 808). If necessary to
3 assess these factors, “the court may require counsel to provide a record of the hours worked and
4 counsel’s regular hourly billing charge for noncontingent cases.” *Crawford*, 586 F.3d at 1148;
5 *Gisbrecht*, 535 U.S. at 808.

6 Lastly, fees under § 406(b) are “paid out of a successful claimant’s past-due benefits” and
7 because the Commissioner “has no direct financial stake” in the fee award, it “plays a part in the
8 fee determination resembling that of a trustee for the claimants.” *Ciletti v. Berryhill*, No. 17-cv-
9 05646-EMC, 2019 U.S. Dist. LEXIS 4993, *3 (N.D. Cal. Jan. 9, 2019); *Gisbrecht*, 535 U.S. at
10 808. As such, “§ 406(b) calls for court review of such arrangements as an *independent check* to
11 assure that they yield reasonable results in particular cases.” *Gisbrecht*, 535 U.S. at 807 (emphasis
12 added).

13 B. Analysis

14 The Court must begin with the contingent-fee agreement. *See Gisbrecht*, 535 U.S. at 808.
15 Here, the agreement provides that Mr. Sackett will receive “a fee no greater than 25% of the past-
16 due benefits owed to [the claimant].” *See* Mot. at Ex. C. Because the agreement plan and Mr.
17 Sackett’s request are within the maximum allowed by § 406(b), the reasonableness question turns
18 on whether the 25% of past-due benefits is reasonable when considering the other *Crawford*
19 factors. *See, Crawford*, 586 F.3d at 1148-49. This memorandum will therefore address each of
20 the *Crawford* factors in turn.

21 First, there is no indication from the record that Mr. Sackett provided “substandard
22 representation.” *Gisbrecht*, 535 U.S. at 808. To the contrary, Mr. Sackett successfully appealed
23 the agency’s denial of benefits before this Court. *See* Summ. J. Order at 1-5. The first *Crawford*
24 factor favors upholding the requested fee amount because Mr. Sackett adequately represented
25 Plaintiff.

26 Second, it appears that Mr. Sackett did not delay the adjudication of Plaintiff’s case in
27 order to “profit from the accumulation of benefits during the pendency of the case in court.”
28 *Gisbrecht*, 535 U.S. at 808. Mr. Sackett acknowledges, as the docket reflects, that Plaintiff

1 requested two extensions to file his motion for summary judgment. *See*, Docket No. 14; Docket
2 No. 16; Mot. at 4. Mr. Sackett requested both extensions because he had multiple “administrative
3 hearings and district court briefs due” at the time the motions before this Court were due. *See*,
4 Docket Nos. 14, 16. These extensions only added two months to the overall time it took to
5 adjudicate this action. *Id.* Because the delay was minimal, there is no evidence of bad faith in
6 seeking the extensions, and Defendant does not contest that Mr. Sackett was not diligent, the
7 second *Crawford* factor also favors upholding the requested fee amount.

8 Finally, the Court may question the requested fee amount “if the benefits are large in
9 comparison to the amount of time counsel spent on the case.” *Gisbrecht*, 535 at 808. Presently,
10 Mr. Sackett is asking this Court to award \$21,747.00 for 19.9 hours of work, for a total *de facto*
11 hourly rate of \$1,092.81.00 (before subtracting the EAJA value). *See* Mot. at 1, 11. This is a very
12 large hourly rate, especially compared to Mr. Sackett’s typical hourly rate of \$435.00. *See* Mot. at
13 9 (using the median average rate for all San Francisco attorneys as an equivalent for Mr. Sackett’s
14 own hourly rate). In addressing the significant difference between Mr. Sackett’s typical non-
15 contingent hourly rate and the hourly rate resulting from the contingency-based award, the Court
16 may use “the lodestar calculation, *but only as an aid* in assessing the reasonableness of the fee.”
17 *Crawford*, 586 F.3d at 1151 (emphasis in the original). This is because courts generally accept
18 that “the resulting *de facto* hourly rates may exceed those for non-contingency-fee arrangements”
19 in the § 406(b) context. *Hearn v. Barnhart*, 262 F. Supp. 2d. 1033, 1037 (N.D. Cal. 2003).

20 This Court has previously questioned Mr. Sackett’s exorbitantly large hourly rates in
21 contingency fee cases. In *Goucher v. Colvin*, for example, Mr. Sackett requested 25% of past-due
22 benefits pursuant to a contingency fee agreement that resulted in a *de facto* hourly rate of \$814.00.
23 No. 14-cv-03009-EMC, 2017 U.S. Dist. LEXIS 126554, *7 (N.D. Cal. Aug. 9, 2017). This Court
24 noted that the hourly rate was high, “particularly in a Social Security case,” and that Mr. Sackett
25 had not met his burden of showing that it was reasonable to receive such a large award. *Id.* This
26 Court was particularly troubled by (1) the fact that Mr. Sackett’s noncontingent hourly rate was
27 \$300 to \$400 and (2) he “[had] never actually been awarded a *de facto* hourly rate in the \$814
28 neighborhood.” *Id.* at *7–10. Indeed, “the past-due benefits (over \$100,000) [were] large

1 compared to the amount of time Sackett spent on the case (about 31 hours).” *Id.* at *7. Thus, the
2 Court reduced Mr. Sackett’s attorney’s fee award to a gross of \$18,540.00, which resulted in a *de*
3 *facto* hourly rate of \$600.00. *Id.* at *10–11.

4 Here, Mr. Sackett similarly fails to provide an estimate of his present-day non-contingent
5 hourly rate, instead providing data from the Consumer Survey Report to indicate that the average
6 median rate for all attorneys in San Francisco is \$435.00 per hour. Mot. at 9. He argues that both
7 his experience in social security disability law and record of success warrant a noncontingent rate
8 within “the 95% Median Attorney Rate (\$688.00).” *Id.* at 10. He also contends that the low
9 chance of success in social security appeals of benefit denials—which he estimates is at 24.25%
10 —means that the Court should apply a 4.08 multiplier. *See Id.* at 5. Lastly, Mr. Sackett cites to
11 numerous contingency fee cases where courts have awarded him similar fee amounts. *See,*
12 *Ainsworth v. Berryhill*, No. 5:16-cv-03933-BLF, 2020 U.S. Dist. LEXIS 194416, *6-8 (N.D. Cal.
13 Oct. 20, 2020) (granting an effective hourly rate of \$1,325.34 for 22.3 hours worked resulting in
14 approximately 23.03% of the past-due benefits); *Dreesman v. Colvin*, No. 16-cv-02549-HRL,
15 2019 U.S. Dist. LEXIS 167278, *5-6 (N.D. Cal. Sept. 27, 2019) (granting an effective hourly rate
16 of \$1,034.86 for 22.65 hours worked, resulting in a total of 14.9% of the past-due benefits); *Perl v.*
17 *Comm’r of SSA*, No. 1:16-cv-00196-SAB, 2018 U.S. Dist. LEXIS 143807, *5-6 (E.D. Cal. Aug.
18 23, 2018) (granting an effective hourly rate of \$1,075.23 for 31.6 hours worked, resulting in the
19 complete 25% of past-due benefits); *Heath v. Berryhill*, No. 3-cv-01811-EDL, 2017 U.S. Dist.
20 LEXIS 221883, *6-7 (N.D. Cal. Aug. 28, 2017) (granting an effective hourly rate of \$1,437.80 for
21 32.35 hours worked, resulting in a total of just below 25% of past-benefits due).

22 As shown above, Mr. Sackett has successfully addressed the issues that lead to this Court’s
23 prior skepticism in *Goucher* in this Court’s sister courts and at present. First, Mr. Sackett has
24 demonstrated that he has been able to obtain a *de facto* fee award of about \$1,000.00 in at least
25 four cases since *Goucher*, including in a case adjudicated last year. *See, Ainsworth*, 2020 U.S.
26 Dist. LEXIS, at *6-8; *Dreesman*, 2019 U.S. Dist. LEXIS, at *5-6; *Perl*, 2018 U.S. Dist. LEXIS, at
27 *5-6; *Heath*, 2017 U.S. Dist. LEXIS, at *6. Similarly, Mr. Sackett provides statistical data from
28 the Social Security Advisory Board indicating the significant risk of loss in these social security

1 benefit denial cases. *See* Mot., Ex. E. Also, other courts in this district have approved similar
2 amounts in the § 406(b) context as recently as June of 2021. *See, Young*, 2021 U.S. Dist. LEXIS
3 at *3. The third *Crawford* factor therefore also favors an award to Mr. Sackett of the contingent-
4 fee award he requests.

5 **IV. CONCLUSION**

6 For the foregoing reasons, the Court **GRANTS** Plaintiff's motion for an award of
7 attorney's fees under section 406(b), without diminishing the requested fee amount.

8 This order disposes of Docket No. 26.

9
10 **IT IS SO ORDERED.**

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12 Dated: July 22, 2021

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15 EDWARD M. CHEN
16 United States District Judge